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TUCKER ON THE TREATY-MAKING POWER.

The present generation has seen the United States rise from a position of comparative isolation among the nations to the rank of a great world power. The Spanish-American war—a small affair in itself as wars go—marked the beginning; at the close of the present struggle in Europe the United States may be the one nation of commanding influence, to which the other nations will look for leadership or moral support. Under such conditions a peculiar interest attaches to the treaty-making power, for by its exercise our relations with foreign nations will be largely determined. At this time, therefore, a book such as Mr. Tucker's scholarly work on the "Limitations on the Treaty-Making Power" is to be cordially welcomed. In this book the author's general purpose, as stated in his own words, is as follows: "By a critical examination of the provisions of the Constitution of the United States; in the interpretation thereof by the early and modern statesmen of the country; in the opinion of judges, State and Federal; and in the adjudicated cases in their bearing upon this question, we shall hope to eliminate the prevalent error of the 'unlimited' and boundless scope of this power and establish what are the reasonable and constitutional 'limitations on the treaty-making power' under the Constitution of the United States." The views especially combatted are those of Mr. Charles Henry Butler in his recent work on the treaty-making power. It would appear from the mass of evidence presented by Mr. Tucker that all the authorities agree that the treaty-making power is not in an absolute sense unlimited, and, in the language of Mr. Butler: "The question is not whether the power is limited or unlimited, but at what point do the limitations begin."

It is not possible within our limits even to refer to all the topics discussed by Mr. Tucker. The main point at issue, however, is the relation of treaties to the laws of the individual states. Does the provision of the Constitution that "all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land," mean that treaties may override all state laws in conflict therewith which may be

adopted by the states in the exercise of their reserved powers? To this question Mr. Tucker especially addresses himself. In this connection he reviews the judicial decisions affecting the question, particularly those of the Supreme Court, by which court, of course, all questions respecting private rights under treaties must be finally determined. It is pointed out that in no case has the Supreme Court held a law of a state void because in conflict with a treaty, unless the case of *Ware v. Hylton*, 3 Dallas 199, be considered to have so held. Mr. Tucker devotes an entire chapter to this famous case, and concludes that it did not establish, as is generally supposed, the supremacy of a treaty over state laws. While as to the actual holding of three of the four justices Mr. Tucker's conclusion seems correct, it is possible that he has not given sufficient weight to the clearly expressed opinion of these three judges that in case of a conflict between a treaty and a valid state law, the treaty would prevail.

The subject of inheritance by aliens is treated in a separate chapter. This is a most important chapter for it is quite common to suppose that the decisions that aliens may inherit under treaties so providing, notwithstanding state laws to the contrary, settle the question of the supremacy of treaties. But, as clearly brought out by Mr. Tucker, these cases hold, not that the treaty supersedes the state law of descent, but rather that it changes the status of the aliens affected so that they are no longer aliens so far as relates to this particular right, and hence are not within the prohibition of the state law. Mr. Tucker says: "That the government of the United States, under its treaty power, may change the status of an alien in this country, cannot be denied. The change of that status, it is admitted, may give the right of inheritance which would be unavailing to him but for such change; but this right is conceded to him by reason of the fact that his status as an alien has been changed to that of native, *quoad* the particular right." (Page 144.) So also he quotes a California judge as to the effect of such a treaty: "The statutes of distribution are not altered or affected. Alienage is the subject of the treaty. * * * The disability to succeed to property is alone removed, the character of the person is made politically to undergo a change, and then the statute of distribution is

left to its full effect, unaltered and unimpaired in word or sense." (Page 167.)

One of the most readable and informing chapters in the book is Chapter IX on the treaty power in its obligations to foreigners. In this chapter the author recounts the several instances in which foreigners in this country have suffered from mob violence and their respective governments have sought satisfaction from the federal government. Copious extracts from the diplomatic correspondence following these outrages leave no doubt in the mind of the reader as to the position of our government on this subject, that is, that the foreigner has no right to complain if he has been afforded such protection in the several states as is afforded by the state governments to their own citizens, and that the federal government has no jurisdiction to protect foreigners in the states except in so far as the federal courts may entertain suits for damages for injury to person or property inflicted in violation of state laws. The limitations on the treaty power in this connection, not only under our constitution but in the nature of the power itself, are convincingly set forth in this chapter.

The longest chapter (Chapter X) is devoted to the relation of the treaty-making power to the police power of the states. This chapter presents the real issue. It is in connection with the police power, as this power is now usually defined, that the conflicts between the state and the federal governments may most naturally arise. In this chapter Mr. Tucker brings out with many apt quotations the vital character of the police power as essential to the very existence of the states, and contends that the treaty-making power cannot constitutionally be paramount to the police power. Numerous cases are cited from the decisions of the Supreme Court to the effect that the police power is inalienable, and in contrast with these are noted the line of cases in which the same court has held that even the police power must yield to the exercise of the paramount power of Congress to regulate commerce; that while state police regulations incidentally affecting interstate commerce are valid until superseded by an act of Congress, yet if Congress acts, all state laws that conflict with the constitutional laws of Congress on the subject

must yield. If this be so, is not the same true of state laws in conflict with treaties? If the federal power to regulate commerce is paramount to the police power of the state, is not the federal treaty-making power likewise paramount? The answer must be in the affirmative, provided, however, the treaty itself be valid. An unconstitutional act of Congress is not superior to a state law, nor is an unconstitutional treaty. Both act and treaty in such case are nullities. But when is a treaty unconstitutional? What are the limitations on the treaty-making power? That is our difficulty. Mr. Tucker fully realizes the necessity of distinguishing between the commerce power and the treaty-making power in their relation to the police power of the states unless he is to yield his contention of the independence of the police power. In meeting this difficulty Mr. Tucker discloses the "chivalry of his intellect and his loyalty to truth when once discovered" which he himself ascribes to Mr. Butler (page 121). He frankly meets the issue and argues with force that a distinction may be made between the two federal powers in their relation to the police power.

One chapter is devoted to the Japanese-California controversies. In this Mr. Tucker makes it clear from the provisions of the treaty with Japan and the California statutes that the latter did not conflict with the treaty, and further shows that the "rights and privileges of residence" do not embrace those of education. The real grievance of Japan, it would seem, as a matter of fact, was not that the treaty had been violated but simply that the state laws discriminated against Japanese, excluding them from the white schools while admitting foreigners of other nationalities. In referring to the fact that the question with Japan was disposed of without proceeding to judgment, Mr. Tucker remarks: "It may be doubted whether such has been a happy disposition of the question. It is common with us to boast that the distinguishing characteristic of our diplomacy has been its frankness. If this be true, may it not be more in consonance with that spirit that the nations of the world, whose intercourse we enjoy and whose commerce we seek, shall understand in no uncertain way that the constitutional government under which we live will be maintained inviolate, no less in the interest of

American citizens in the preservation of their rights guaranteed to them in the Constitution of the country, than in the interest of those whose pleasure or profit may bring them temporarily to our shores?" (Page 396.) In this fine passage Mr. Tucker exposes the unreasonableness of a claim that foreigners should enjoy in this country rights superior to those of our own citizens. In treaty making "America first" is a good slogan, and our treaty-making authorities may well recognize that all our treaties should be made for the benefit of our own citizens and not primarily in the interest of foreigners, however deserving.

Mr. Tucker's book is written frankly from the standpoint of a zealous advocate of states' rights. We like it none the less on this account. The recent expansion of federal power was inevitable, and, on the whole we believe, advantageous, but we still need the states. And at a time when the trend of opinion is so strongly toward nationalization, a note of caution such as this is doubly welcome. We believe that the treaty-making power as defined by Mr. Tucker would generally be found comprehensive enough for all useful purposes. And to all students of the subject, as well as to those upon whom devolves the responsible duty of framing our treaties with foreign powers, this book should be of great interest and value. Even those who claim for the treaty-making power a wider scope than that allowed by Mr. Tucker must admit the force of his general argument although they may not accept all of his conclusions. Certainly it would seem that no intelligent person after reading this book could seriously claim that the treaty-making power is unlimited. Moreover, the limitations suggested by Mr. Tucker in his concluding chapter are all of them reasonable and most of them fully supported by the authorities. We may note in conclusion the pleasing refinement of the author's literary style and his courtesy toward those whose views he combats.

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